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 Miguel Angel Avila-Quezada

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. THOMAS WHELAN)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIGUEL ANGEL AVILA-QUEZADA,

Defendant.

Case No. 08-CR-2023-W

DEFENSE MOTION TO COMPEL
 DISCOVERY

DATE: July 21, 2008
 TIME: 2:00 pm
 JUDGE: Hon. Whelan

I.

STATEMENT OF FACTS

On April 23, 2008, Border Patrol Agents Barr and Sivilli responded to a seismic intrusion device in an area approximately twelve miles north Tecate, California Port of Entry. Their investigation lead them to a trailer in a compound on private property occupied by six individuals, including Mr. Avila-Quezada. The agents looked through the trailer windows and saw Hispanic men inside. Acting without a warrant, the agents opened the trailer door and told the men to come outside. When questioned, Mr. Avila-Quezada admitted to being a citizen of Mexico. Mr. Avila-Quezada was then handcuffed and taken to a station where he was fingerprinted for further investigation.

The U.S. filed a complaint against Mr. Avila-Quezada for violating 8 U.S.C. 1326 alleging

1 Mr. Avila-Quezada is an alien, previously deported was found within the territory of the United
2 States. Mr. Avila-Quezada's fingerprints lead the U.S. to discover his immigration and criminal
3 history.

4 Counsel has received initial discovery in this case. Nonetheless, Mr. Avila-Quezada, by and
5 through his attorney, Lisa Kay Baughman, moves for the production by the government of the
6 following items. This request is not limited to those items that the prosecutor knows of, but rather
7 includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely
8 related...investigatory [or other] agencies" under United States v. Bryan, 868 F.2d 1032, 1040 (9th
9 Cir. 1989), cert. denied, 493 U.S. 858 (1989):

10 (1) The Defendant's Statements Under Fed. R. Crim. P. 16 (a)(1)(A) the defendant is entitled
11 to disclosure all copies of any written or recorded statements made by the defendant; the substance
12 of any statements made by the defendant which the government intends to offer in evidence at trial;
13 any recorded testimony of the defendant before the grand jury; any response by the defendant to
14 interrogation; the substance of any oral statements which the government intends to introduce at
15 trial, and any written summaries of the defendant's oral statements contained in the handwritten
16 notes of the government agent; any response to any Miranda warnings which may have been given
17 to the defendant (See United States v. McElroy, 697 F.2d 459 (2d Cir. 1982)); and any other
18 statements by the defendant that are discoverable under Fed. R. Crim. P. 16(a)(1)(A). The Advisory
19 Committee Notes as well as the 1991 amendments to Rule 16 make it clear that the Government
20 must reveal all the defendant's statements, whether oral or written regardless of whether the
21 Government intends to introduce those statements;

22 (2) Arrest Reports, Notes and Dispatch Tapes The defendant also specifically requests that
23 all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding
24 her arrest or any questioning, if such reports have not already been produced in their entirety, be
25 turned over to her. This request includes, but is not limited to, any rough notes, records, reports,
26 transcripts or other documents in which statements of the defendant or any other discoverable
27 material is contained. This is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v.
28 Maryland, 373 U.S. 83 (1963). See also United States v. Johnson, 525 F.2d 999 (2d Cir. 1975), cert.

denied, 424 U.S. 920 (1976); United States v. Lewis, 511 F.2d 798 (D.C. Cir. 1975); United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967); Loux v. United States, 389 F.2d 911 (9th Cir. 1968), cert. denied, 393 U.S. 867 (1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are available under Fed. R. Crim. P. 16(a)(1) (C), Fed. R. Crim. P. 26.2 and 12(i);

(3) Reports of Scientific Tests or Examinations Pursuant to Fed. R. Crim. P. 16(D), the defendant requests the reports of all tests and examinations conducted upon the evidence in this case, including but not limited to the scientific chemical testing done upon the drugs seized in this case to determine if it was indeed (cocaine) and any fingerprint testing done upon any evidence seized in this case, that is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial;

(4) Brady Material The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Impeachment as well as exculpatory evidence falls within Brady's definition of evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976);

(5) Any Information that May Result in a Lower Sentence under the United States Sentencing Guidelines (U.S.S.G.) As discussed above, this information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963). This request includes any cooperation or attempted cooperation by the defendant, as well as any information that could affect any base offense level or specific offense characteristic under Chapter Two of the U.S.S.G. Also included in this request is any information relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, or any other application of the U.S.S.G.;

(6) The Defendant's Prior Record Evidence of prior record is available under Fed. R. Crim. P. 16(a)(1)(B);

(7) Any Proposed 404(b) Evidence Evidence of prior similar acts is discoverable under Fed.

R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature . . ." of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests that such notice be given three weeks before trial in order to give the defense time to adequately investigate and prepare for trial;

(8) Evidence Seized Evidence seized as a result of any search, either warrantless or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(C);

(9) Request for Preservation of Evidence The defendant specifically requests that all dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case be preserved. California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988); U.S.C.A. Const. Amend. 14. This request includes, but is not limited to, any samples used to run any scientific tests, any narcotics, and any evidence seized from any third party. It is requested that the government be ordered to question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist, to inform those parties to preserve any such evidence;

(10) Tangible Objects The defendant requests, under Fed. R. Crim. P. 16(a)(1)(C), the opportunity to inspect and copy as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, photographs of building or places or copies of portions thereof which are material to the defense or intended for use in the government's case-in-chief, or were obtained from or belong to the defendant;

(11) Evidence of Bias or Motive to Lie The defendant requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States v. Striffler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989);

(12) Impeachment Evidence The defendant requests any evidence that any prospective government witness has engaged in any criminal act, whether or not resulting in a conviction, and whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609

1 and 613. Such evidence is discoverable under Brady v. Maryland, supra. See United States v.
 2 Strifler, supra (witness' prior record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965)
 3 (evidence that detracts from a witness' credibility);

4 (13) Evidence of Criminal Investigation of Any Government Witness The defendant requests
 5 any evidence that any prospective witness is under investigation by federal, state or local authorities
 6 for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985) cert. denied, 474 U.S.
 7 945 (1985);

8 (14) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling
 9 The defense requests any evidence, including any medical or psychiatric report or evaluation,
 10 tending to show that any prospective witness' ability to perceive, remember, communicate, or tell the
 11 truth is impaired; and any evidence that a witness has ever used narcotics or other controlled
 12 substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988);
 13 Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980);

14 (15) Witness Addresses The defendant requests the name and last known address of each
 15 prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United
 16 States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel
 17 is ineffective); United States v. Cook, 608 F.2d 1175, 1180 (9th Cir. 1979) (defense has equal right
 18 to talk to witnesses), cert. denied, 444 U.S. 1034 (1980). The defendant also requests the name and
 19 last known address of every witness to the crime or crimes charged (or any of the overt acts
 20 committed in furtherance thereof) who will not be called as a government witness. United States v.
 21 Cadet, 727 F.2d 1453 (9th Cir. 1984);

22 (16) Name of Witnesses Favorable to the Defendant The defendant requests the name of any
 23 witness who made an arguably favorable statement concerning the defendant or who could not
 24 identify him or who was unsure of his identity, or participation in the crime charged. Jackson v.
 25 Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir.
 26 1980); Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir.), cert. denied, 439 U.S. 883 (1978); Hudson v.
 27 Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086 (1980);

28 (17) Statements Relevant to the Defense The defendant requests disclosure of any statement

1 that may be "relevant to any possible defense or contention" that he might assert. United States v.
 2 Bailleaux, 685 F.2d 1105 (9th Cir. 1982);

3 (18) Jencks Act Material The defense requests all material to which defendant is entitled
 4 pursuant to the Jencks Act, 18 U.S.C. ' 3500, reasonably in advance of trial, including dispatch tapes.
 5 A verbal acknowledgment that "rough" notes constitute an accurate account of the witness'
 6 interview is sufficient for the report or notes to qualify as a statement under '3500(e)(1). Campbell v.
 7 United States, 373 U.S. 487, 490-92 (1963). In United States v. Boshell, 952 F.2d 1101 (9th Cir.
 8 1991), the Ninth Circuit held that when an agent goes over interview notes with the subject of the
 9 interview the notes are then subject to the Jencks Act. The defense requests pre-trial production of
 10 Jencks material to expedite cross-examination and to avoid lengthy recesses during trial;

11 (19) Giglio Information Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the
 12 defendant requests all statements and/or promises, express or implied, made to any government
 13 witnesses, in exchange for their testimony in this case, and all other information which could
 14 arguably be used for the impeachment of any government witnesses;

15 (20) Personnel Records of Government Officers Involved in the Arrest The defendant
 16 requests all citizen complaints and other related internal affairs documents involving any of the
 17 immigration officers or other law enforcement officers who were involved in the investigation, arrest
 18 and interrogation of him, pursuant to Pitchess v. Superior Court, 11 Cal. 3d 531, 539 (1974). See
 19 Cal. Penal Code §§ 832.7, 832.8, Cal. Evid. Code §§ 1043, 1045. Because of the sensitive nature of
 20 these documents, defense counsel will not be able to procure them from any other source;

21 (21) Government Examination of Law Enforcement Personnel Files The defendant requests
 22 that the government examine the personnel files and any other files within its custody, care or
 23 control, or which could be obtained by the government, for all testifying witnesses, including
 24 testifying officers. The defendant requests that these files be reviewed the government for evidence
 25 of perjurious conduct or other like dishonesty, or any other material relevant to impeachment, or any
 26 information that is exculpatory, pursuant to its duty under United States v. Henthorn, 931 F.2d 29
 27 (9th Cir. 1991), cert. denied, 510 U.S. 933 (1993); Kyles v. Whitley, 514 U.S. 419 (1995). The
 28 obligation to examine files arises by virtue of the defense making a demand for their review: the

1 Ninth Circuit in Henthorn remanded for *in camera* review of the agents' files because the
2 government failed to examine the files of agents who testified at trial. This Court should therefore
3 order the government to review all such files for all testifying witnesses and turn over any material
4 relevant to impeachment or that is exculpatory to the defendant prior to trial; and

5 (22) Expert Summaries Written summaries of all expert testimony that the government
6 intends to present under Federal Rules of Evidence 702, 703 or 705 during its case in chief, written
7 summaries of the bases for each expert's opinion, and written summaries of the experts'
8 qualifications. Fed. R. Crim. P.16(a)(1)(E).

9 (23) Address of Arrest The defendant requests the government provide the exact location,
10 including street address, where he was seized by law enforcement officers. The current description
11 is inadequate for defense counsel to perform an investigation.

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13 Date: July 7, 2008

Respectfully submitted,

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15 /s Lisa Kay Baughman
16 LISA KAY BAUGHMAN
17 Attorney for Defendant Miguel Angel Avila-Quezada
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LISA KAY BAUGHMAN

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(619) 696-9311

Attorney for Defendant

UNITED STATES DISTRICT COURT

United States of America.

Plaintiff.

V.

MIGUEL ANGE AVILA-QUEZADA,

Defendant.

IT IS HEREBY CERTIFIED THAT:

I hereby certify that I served:

to the following CM/ECF participants in this case:

There are no non-ECF participants on this case to be notified by United States Parcel Service.

Date: July 7, 2008.